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No. 80-1509

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES THONE, Governor of The State of Nebraska, *et al.*,
Appellants,

vs.

WOMENS SERVICES, P.C., *et al.*,
Appellees,

CHARLES THONE, Governor of The State of Nebraska, *et al.*,
Appellants,

vs.

LADIES CENTER, NEBRASKA, INC., *et al.*,
Appellees,

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vs.

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Appellees.

On Appeal from The United States Court of Appeals
for the Eighth Judicial Circuit

MOTION AND BRIEF OF APPELLEES, WOMENS SERVICES, P.C., AND G. WILLIAM ORR, M.D., TO DISMISS APPELLANTS' "JURISDICTIONAL STATEMENT" AND TO AFFIRM THE JUDGMENTS BELOW

LAWRENCE I. BATT
GARBER & BATT
554 Continental Bldg.
19th & Douglas Streets
Omaha, Nebraska 68102
(402) 346-2000

FRANK SUSMAN
SUSMAN, SCHERMER,
RIMMEL & PARKER
Tenth Floor-Aragon Place
7711 Carondelet Avenue
St. Louis, Missouri 63105
(314) 725-7300

Attorneys for Appellees, Womens Services, P.C., and G. William Orr, M.D.

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

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Come now Appellees, Womens Services, P.C., and G. William Orr, M.D., and pursuant to Rule 16.1(a) of this Honorable Court move to dismiss the "Jurisdictional Statement", heretofore filed by Appellants for failure to conform to Rule 33.2(a)(4) of this Honorable Court.

Come now Appellees, Womens Services, P.C., and G. William Orr, M.D., and pursuant to Rule 16.1(c) and (d) of this Honorable Court move to affirm the PER CURIAM decision of December 8, 1980, as unanimously rendered by the United States Court of Appeals for the Eighth Judicial Circuit in Appeal Nos. 80-1192 and 80-1193, reported at 636 F.2d 207 (8th Cir. 1980), the Honorable Donald R. Ross, Circuit Judge, Floyd R. Gibson, Senior Circuit Judge and Howard F. Sachs, District Judge (sitting by designation), presiding.

Said named Appellees move to affirm on the grounds that it is manifest that the federal questions raised by Appellants are so unsubstantial as to need no further argument nor adjudication; on the grounds that the judgments below rest upon adequate non-federal bases; and on the grounds that said federal questions, even if substantial, have been expressly, repeatedly, wisely and convincingly decided by other Circuit Courts of Appeals and by other District Courts in a manner wholly consistent with the opinions below.

WHEREFORE, said named Appellees pray this Honorable Court to dismiss Appellants' "Jurisdictional Statement" and to affirm the decision herein appealed.

LAWRENCE I. BATT
GARBER & BATT
554 Continental Bldg.
19th & Douglas Streets
Omaha, Nebraska 68102
(402) 346-2000

FRANK SUSMAN
SUSMAN, SCHERMER,
RIMMEL & PARKER
Tenth Floor - Aragon Place
7711 Carondelet Avenue
St. Louis, Missouri 63105
(314) 725-7300

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ARGUMENT

I

This Appeal Fails To Raise Any Question As To The Appropriate Legal Standard Of Review Under The Federal Constitution Of Statutes Regulating The Performance Of Abortions.

The appropriate legal standard for constitutional review of abortion regulation has been clearly established by this Honorable Court in *Roe* v. *Wade,* 410 U.S. 113 (1973) and *Doe* v. *Bolton,* 410 U.S. 179 (1973) and their progeny.

The various Circuits have been uniformly consistent in the interpretation and application of such standards. See: *Baird* v. *Department of Public Health of The Commonwealth of Massachusetts,* 599 F.2d 1098, 1102 (1st Cir. 1979); *Poe* v. *Gerstein,* 517 F.2d 787, 791 (5th Cir. 1975), *affirmed,* 428 U.S. 901 (1976); *Mahoning Women's Center* v. *Hunter,* 610 F.2d 456, 459 (6th Cir. 1979), *vacated and remanded on other grounds,* ____ U.S. ____ (1980), 65 L.Ed.2d 1110; *Charles* v. *Carey,* 627 F.2d 772, 777 (7th Cir. 1980); *Reproductive Health Services* v. *Freeman,* 614 F.2d 585, 594 (8th Cir. 1980), *vacated and remanded on other grounds,* ____ U.S. ____ (1980), 66 L.Ed.2d 13.

Appellants ardently seek to create waves from still waters. In support, Appellants cite three cases: *Akron Center for Reproductive Health, Inc.* v. *City of Akron,* 479 F.Supp. 1172 (N.D.Ohio 1979); *Charles* v. *Carey,* ____ F.Supp. ____ (N.D.Ill., Nos. 79-C-4541 and 79-C-4558, Slip Opinion, Nov. 16, 1979); And, *Planned Parenthood* v. *Blanton,* ____ F.Supp. ____ (N.D. Tenn., No. 78-2310, Slip Opinion, Aug. 31, 1979). All three cases are clearly inapplicable.

(a) The "rational" standard adopted by the District Court in *Akron, supra,* has been implicitly reputed by the later Sixth Circuit opinion in *Mahoning Women's Center, supra,* and expressly

referred to and rejected by the Seventh Circuit in *Charles, supra,* 627 F.2d 772, 778 at n.6.

(b) The District Court opinion in *Charles, supra,* does not support the interpretation given to it by Appellants. (See Slip Opinion at 25). In addition, there exists no ambiguity within the Seventh Circuit's opinion in *Charles, supra,* as to the appropriate standard of review. See: *Charles, supra,* 627 F.2d at 777-778.

(c) The District Court in *Planned Parenthood* v. *Blanton,* sub nom., *Planned Parenthood of Memphis* v. *Alexander,* ____ F.Supp. ____ (W.D.Tenn., No. 78-2310, Mar. 23, 1981), issued its ruling on the merits. It concludes by concurring with all other courts on this issue, save *Akron, supra.* See: Slip Opinion at 17.

Neither language quoted out of context, opinions subsequently reversed or overruled, nor Appellants' most fervent desire can create dissension or disagreement as to legal principles, which do not in fact or law exist.

II

The District Court Properly And Correctly Found That The Mandated Forty-Eight Hour Delay Created An "Undue Burden" Upon The Election And Performance Of First Trimester Abortions.

Appellants urge this Honorable Court to ignore the express, factual findings of the District Court in this regard. The District Court specifically found as matters of fact that a mandated 48 hour delay would "impose an undue burden" by reasons of "increased cost", "one additional trip", "stay in Omaha the duration of the waiting period" and "increase in risk to the pregnant woman's health". 483 F.Supp. at 1050.

Appellants blithely choose to ignore the sound reasoning and clear language of the District Court and to rely upon their own tortured interpretations and fallacious non-sequitors. The real crux of Appellants' position is found in their unsupportable plea that any regulations that "are reasonable and related to the legitimate state interest of protecting the decision making process" be permitted. (Jur. State. at 16). This Honorable Court has never recognized such a legitimate state interest during the first trimester. The phrophetic wisdom of this High Court in insulating early pregnancies and sound medical practice from the vicissitudes of legislative interference has proven correct. It would be myopic to ignore the legion of federal court decisions which, while faithfully tracking this Honorable Court's decisions, have consistently voided such legislative intrusions.

The courts have repeatedly voided such mandated delays imposed under all circumstances; thereby allowing physicians the freedom to alter the practice of medicine to fit the differing health exigencies of each patient. See: *Charles, supra,* 627 F.2d at 785-786; *Planned Parenthood Association of Kansas City, Missouri, Inc.* v. *Ashcroft,* 483 F.Supp. 679, 696 (W.D.Mo. 1980); *Wolfe* v. *Stumbo,* ____ F.Supp. ____ (W.D. Ky., No. C80-0285L(A), Dec. 3, 1980); *Planned Parenthood of Memphis* v. *Alexander,* ____ F.Supp. ____ (W.D.Tenn., No. 78-2310, Mar. 23, 1981); *Leigh* v. *Olson,* 497 F.Supp. 1340, 1347-1348 (D.N.D. 1980); *Margaret S.* v. *Edwards,* 488 F.Supp. 181, 212-213 (E.D.La. 1980); *Planned Parenthood League of Massachusetts* v. *Bellotti,* ____ F.2d ____ (1st Cir., No. 80-1580, Feb. 9, 1981); And, *Women's Community Health Center, Inc.* v. *Cohen,* 477 F.Supp. 542, 550-551 (D.Me. 1979), among others. The sole exception is *Akron Center for Reproductive Health, Inc.* v. *City of Akron,* 478 F.Supp. 1172 (N.D.Ohio 1979), *appeal pending,* which as noted *supra* has been implicitly overruled in its own Circuit by *Mahoning Women's Center* v. *Hunter,* 610 F.2d 456, 460 (6th Cir. 1979) and expressly rejected by the Seventh Circuit in *Charles* v. *Carey,* 627 F.2d 772, 778 at n.6. (7th Cir. 1980).

III

The District Court Properly And Correctly Found That The Mandated Notice Requirement By A Minor To Her Parent For Abortion "* * * Poses An Absolute Obstacle Which Might, In Some Instances, Unduly Burden A Minor's Constitutional Right To Procure An Abortion". ("Memorandum And Order On Motion To Intervene, Motion For Reconsideration And Motions For Summary Judgment", August 1, 1979, Appendix B at 55).

Appellants in one short paragraph beguilingly suggest that this entire issue is controlled in all respects by *H.L.* v. *Matheson,* ____ U.S. ____ (1981), 49 L.W. 4255 (March 23, 1981). Appellees herein respectfully suggest otherwise.

Initially, it should be noted that in the District Court Appellants conceded and agreed to be bound on this issue solely by this Honorable Court's opinion in *Bellotti* v. *Baird,* 443 U.S. 662 (1979). "The defendants in their letter to the court dated July 20, 1979, agreed that the parental consultation issue is controlled by the *Bellotti* case." "Memorandum And Order On Motion To Intervene, Motion For Reconsideration And Motions For Summary Judgment", August 1, 1979, Appendix B at 57.

Secondly and more importantly, The Nebraska Statute in this cause (§28-333 [Appendix E at 78-79]) is markedly and significantly different than the Utah statute in *H.L., supra,* (§76-7-304 [49 L.W. at 4256]).

The Utah statute's excepting language of "(n)otify, if possible" was held by the Utah Supreme Court and accepted by this Honorable Court to mean "that the physician is required to notify parents 'if under the circumstances, in the exercise of reasonable diligence, he can ascertain their identity and location and it is feasible or practicable to give them notification.' " *H.L., supra,* 49 L.W. at 4257.

The Nebraska statute under consideration here arbitrarily and uniformly provides "(n)o abortion shall be performed on any minor without * * * a written statement by her indicating that she has consulted with her parent." Section 28-333, Appendix E at 78-79. No exception whatever is made for the minor who can not under the then attendant circumstances, in the exercise of reasonable diligence, either ascertain the identity of her parent or guardian, ascertain the location of her parent or guardian, or who for a myriad of other forseeable situations can neither feasibly nor practicably give such notice.

The minor in Nebraska, unable to give such notification by reason of physical circumstances beyond her making or control, must experience a pregnancy constituting a medical emergency, with its concomitant life-threatening risks to her, before she can obtain an abortion without such unobtainable parental notification, if, at all. The preceding is the only scenario under which a minor in Nebraska can obtain an abortion when *unable* to notify her parent. In this critical regard, the Utah statute approved by this Honorable Court in *H. L., supra,* stands light years apart from the Nebraska statute voided by Chief Judge Urbom and by the Eighth Circuit below.

The Nebraska requirement does permit "parents * * * veto power over the minor's abortion decision" by their unavailability for notice and ignores the fact that "time is likely to be of the essence in an abortion decision"; two critical matters addressed by this Honorable Court in *H. L., supra.* 49 L.W. at 4258-4259.

IV

Appellants Argument As To The Issue Of Corporate Standing Is Applicable Only To Appellee, Ladies Center, Nebraska, Inc., And, Accordingly, Appellees Herein Make No Reply.

V

The District Court Properly And Correctly Found That Abstention As To §28-326(8) Of Nebraska Revised Statutes Was Inappropriate.

Appellants' position in this regard is not well-taken and their statement that "Judge Urbom agreed that 'the proposed construction [defendants'] of the informed consent provision would significantly affect the nature of the constitutional questions involved.' " (Jur.State. at 20) is grossly misleading. The words of Judge Urbom concluding the sentence and immediately following the words quoted by Appellants are that "* * * I do not agree that the state statute is susceptible of the suggested construction." (Appendix C at 63). As Judge Urbom aptly noted,

> "Because the construction offered by the defendants would strain a plain reading of the provisions in question, I conclude that the provisions are not susceptible of this construction in order to warrant deference to the state courts under the abstention doctrine. * * * Criminal proceedings are an exceedingly severe means of testing out what appears to be a highly improbable construction of a statute, and no person should be subjected to that risk." Appendix C at 64.

Appellants seek to raise for the first time before this Honorable Court an abstention argument as to §28-343, as well. (Jur.State. at 20). This issue was never raised below.

CONCLUSION

This cause and the issues herein contained do not warrant plenary review by this Honorable Court. The judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed forthwith.

Respectfully submitted,

LAWRENCE I. BATT
GARBER & BATT
554 Continental Bldg.
19th & Douglas Streets
Omaha, Nebraska 68102
(402) 346-2000

FRANK SUSMAN
SUSMAN, SCHERMER,
RIMMEL & PARKER
Tenth Floor - Aragon Place
7711 Carondelet Avenue
St. Louis, Missouri 63105
(314) 725-7300

Attorneys for Appellees, Womens Services, P.C., and G. William Orr, M.D.